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No. 598

In the Supreme Court of the United States

October Term, 1938.

ATLAS LIFE INSURANCE COMPANY

vs.

W. I. SOUTHERN, INC.

On Certificate from the United States Circuit Court of Appeals for the Tenth Circuit.

Brief and Argument for Atlas Life Insurance Company.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 598

ATLAS LIFE INSURANCE COMPANY

vs.

W. I. SOUTHERN, INC.

On Certificate from the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF AND ARGUMENT FOR ATLAS LIFE INSURANCE COMPANY.

Statement and Summary.

The matters herein involved arise by reason of the certification of three questions of law by the judges of the United States Circuit Court of Appeals for the Tenth Circuit. The certificate was filed in this court January 16, 1939.

The cause pending in the United States Circuit Court of Appeals for the Tenth Circuit (No. 1733), is an appeal by Atlas Life Insurance Company, a corporation, as appellant, *vs.* W. I. Southern, Inc., a corporation, appellee, from a decision of the United States District Court for the Northern District of Oklahoma, which sustained a motion to dismiss a suit in equity filed by Atlas Life Insurance Company in that court against W. I. Southern, Inc., beneficiary, for the cancellation of policies issued on the life of Wheaton I.

Southern. The policies in question were issued on March 13, 1936, one policy being for $25,000.00, one for $15,000.00, and one for $10,000.00. (Cert., p. 1) Each policy contained the following clause relating to incontestability:

> "This policy will be incontestable after two years from date of issue except for the nonpayment of premium and except as to provisions and conditions relating to disability benefits and those granting additional insurance specifically against death by accident, if any." (Cert., p. 1)

The insured died February 23, 1938 (Cert., p. 1), eighteen days before the expiration of the two-year contestability period.

The action in the United States District Court for cancellation of the policies was filed by the Insurance Company on March 8, 1938 (Cert., p. 1), five days before the expiration of the contestability period, the grounds of cancellation as set forth in the petition being because of false, intentional and fraudulent answers to questions in the application, material to the risk. (Cert., p. 2)

On March 7, 1938 (Cert., p. 2), twelve days after the death of the insured, W. I. Southern, Inc., the corporate beneficiary, commenced an action against Atlas Life Insurance Company in the District Court of Tulsa County, Oklahoma, and caused a summons to be issued and the same to be served on the Insurance Company on March 7, 1938. (Cert., p. 2)

In the cause brought by the Atlas Life Insurance Company for cancellation of the policies on the grounds of fraud the beneficiary (W. I. Southern, Inc.) filed its motion to dismiss the bill on the ground that the Insurance Company had an adequate remedy at law, by setting up the alleged fraud as a defense to the action on the policies pending in the State Court. (Cert., p. 2) The trial court sustained a motion to

dismiss the bill, a decree was entered dismissing it, and from this decree of dismissal the Insurance Company appealed to the Tenth Circuit Court of Appeals. (Cert., p. 2)

The Atlas Life Insurance Company was and is a citizen and resident of the State of Oklahoma, and being defendant in the suit filed in the State Court of Oklahoma, had no ground for removal to the Federal Court, of the cause there pending. (Cert., p. 2)

The judges of the United States Circuit Court of Appeals for the Tenth Circuit in the certificate filed, have certified to this Court three questions, which are as follows:

> "*1.* Is the remedy at law available in the state court by setting up the alleged fraud as a defense to the action on the policies, such an adequate remedy at law as will constitute a valid defense to the suit in equity for cancellation of the policies?
>
> "*2.* In order to constitute a defense to a suit in equity to cancel a policy of life insurance on the ground of fraud, is it essential that the remedy at law be available to the complainant in an action at law pending in the federal court?
>
> "*3.* Is the principle that the adequate remedy at law which will preclude a federal court of equity from granting relief must be one available in the federal courts, applicable in the instant case where the relief sought is affirmative in form but defensive in character?" (Cert., pp. 2-3).

This brief and argument is filed on behalf of Atlas Life Insurance Company.

Statutes Involved.

There are no statutes necessary for the decision of these certified questions save and except section 267 of the Judicial Code, U. S. C. A., Title 28, section 384, which provides:

> "Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law,"

and certain statutes of the State of Oklahoma which we believe pertinent to the decision of the certified questions. These are the following sections of Oklahoma Statutes 1931:

164 relating to the commencing of a civil action;

165 relating to the petition;

166 relating to the issuance of summons;

168 relating to the service and return of summons;

217 relating to the time of filing pleadings;

231 relating to motions;

101 relating to the time of bringing civil actions;

and are set out, each under its appropriate number, in the appendix hereto.

The decision of the United States District Court for the Northern District of Oklahoma, in the instant case, is officially reported in 23 Fed. Supp. 334, under the style of *Atlas Life Insurance Company* v. *W. I. Southern, Inc.*

ARGUMENT *and* AUTHORITIES.

POINT I.

The First Question Certified to Should Be Answered in the Negative.

In a long line of unbroken decisions, this Court has held that the remedy at law which is a bar to equity jurisdiction, must be a remedy at law available to the plaintiff in a court of the United States. The following cases sustain the negative of the first question certified:

Arrowsmith v. *Gleason*, 129 U. S. 86;
Smyth v. *Ames*, 169 U. S. 466;
Chicago, B. & Q. Ry. Co. v. *Osborne*, 265 U. S. 14;
Risty v. *Chicago, etc., Ry. Co.*, 270 U. S. 378;
Henrietta Mills v. *Rutherford County*, 281 U. S. 121;
Di Giovanni v. *Camden F. Insurance Asso.*, 296 U. S. 64;
Petroleum Exploration, Inc., v. *Public Service Commission of Ky.*, 304 U. S. 209.

We believe that a citation of the above leading cases is all that is necessary in support of the contention of the Atlas Life Insurance Company that a remedy at law available only in a state court, even if plain, adequate and complete, is not such a remedy as is contemplated or meant by the section of the Judicial Code above set forth. It is therefore no bar to the maintenance of a suit in equity asking cancellation of policies where the requisite jurisdictional amount and the requisite diversity of citizenship exist. We emphasize our position by quotations from the language of some of the cases above cited.

In *Petroleum Exploration, Inc.*, v. *Public Service Commission of Kentucky, supra*, the doctrine is tersely stated:

"It is settled that no adequate remedy at law exists so as to deprive federal courts of equity jurisdiction unless it is available in the federal courts." (l. c., p. 217)

In *Di Giovanni* v. *Camden Fire Insurance Company*, *supra*, the rule is there stated:

"It is true, as this court has often pointed out, that the inadequacy prerequisite to relief in a federal court of equity is measured by the character of remedy afforded in federal rather than in state courts of law." (l. c., p. 69)

and further:

"If a plaintiff is entitled to be heard in the federal courts, he may resort to equity when the remedy at law there is inadequate, regardless of the adequacy of the legal remedy which the state courts may afford." (l. c., p. 69)

In *Risty* v. *Chicago, etc., Ry. Co.*, *supra*, the principle is thus stated:

"The test of equity jurisdiction in a federal court is the inadequacy of a remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts." (l. c., p. 388)

In *Smyth* v. *Ames*, *supra*, the opinion states:

"One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action." (l. c., p. 479)

It must be most apparent that if a litigant cannot be deprived of his right to invoke the equitable jurisdiction of the federal court because he may *sue at law* in a state court, he cannot be deprived of that right because he *may file an answer* in a law case pending in a state court.

We know of no decision in the federal courts which has sustained the affirmative of the first question being here discussed except the case of *New York Life Insurance Co.* v. *Marshall*, (C. C. A. 5th Cir.) 23 F. (2d) 225 (apparently), and the instant case in the Northern District of Oklahoma, above cited.

In the case of *New York Life Insurance Co.* v. *Marshall*, *supra*, there was a dissenting opinion in which the dissent relied upon the case of *Smyth* v. *Ames*, *supra*. The majority opinion in that case cites only *Phoenix Life Insurance Co.* v. *Bailey*, 80 U. S. (13 Wall. 616), and the case of *New York Life Insurance Co.* v. *McCarthy*, (C. C. A., 5th Cir.) 22 F. (2d) 241. An examination of both of the cases cited in this majority opinion discloses that the actions at law in those cases were pending in the federal courts and not in the state courts.

In the case of *New York Life Insurance Co.* v. *McCarthy*, *supra*, the equity case and the law case were both in the federal court and both were tried and appealed. The decree of dismissal of the equity suit was modified and affirmed while the judgment against the insurance company on the policy was reversed and remanded. Moreover, in the case of *New York Life Insurance Co.* v. *Marshall*, *supra*, while the majority opinion apparently based its *opinion* on the ground that the equity suit for cancellation could not be maintained where the fraud which was the ground of cancellation could be set up in defense of a pending action at law on the policy in the state court, the *decision* really turned on the question of jurisdiction. This is shown clearly by the language of the majority opinion from which we quote:

> "The only basis for equitable relief disclosed by the averments of the bill is as to a matter in controversy *which does not exceed*, exclusive of interest and costs, the sum or value of $3,000.00."

The Court's ruling is thus stated:

> "We conclude that the bill was properly dismissed because the only matter in controversy with reference to which relief sought was grantable, involved a sum or value *less than that required* to give the court jurisdiction." (Italics ours.)

The holding in this case being discussed is identical with the holding in *Di Giovanni* v. *Camden Fire Ins. Assn., supra,* where the suit was ordered to be dismissed for want of jurisdiction, because the requisite jurisdictional amount was wanting.

Point II.

The Second Question Should Be Answered in the Affirmative.

The second question certified is the opposite of the first.

We assume that no controlling emphasis should be placed on the word "pending" used therein, but assume that the question presented is intended to be the opposite of the first question. The question was thus formed, no doubt, because of the "pendency" of the law case in the State Court. The cases cited under the first point in our brief in support of the negative of the first question sustain the affirmative of this question.

Further it is the contention of the Atlas Life Insurance Company that even where an action by the insured is pending *in the Federal Court,* to which the Insurance Company may file an answer setting up the fraud claimed as a defense that this does not of necessity deprive the Federal Court of equity jurisdiction to entertain a suit for cancellation of the policies on the ground of fraud.

—*American Life Insurance Co.* v. *Stewart,* 300 U. S. 203;

Ruhlin v. *New York Life Insurance Co.*, (C. C. A. 3rd Cir.) 93 F. (2d) 416;

Stewart v. *American Life Insurance Co.*, (C. C. A. 10th Cir.) 89 F. (2d) 743.

In the case of *American Life Insurance Co.* v. *Stewart*, *supra*, in an opinion by the late Justice CARDOZO, the previous cases are reviewed, and it is there held that although an action at law is pending in the same federal court, to which action the insurance company may file and prove as a defense the fraud in procurement, that equity is not deprived of its jurisdiction. In the opinion attention is called to the principle of law that a "contest" means a present contest in a court, not a notice of repudiation or of a contest to be waged thereafter, and then states the principle:

> "Accordingly an insurer, who might otherwise be condemned to loss through the mere inaction of an adversary, may assume the offensive by going into equity and there praying cancellation. This exception to the general rule has been allowed by the federal courts with impressive uniformity. It has had acceptance in the state courts. It was recognized only recently in an opinion of this court, though the facts were not such as to call for its allowance. *Enelow* v. *New York L. Ins. Co.*, 293 U. S. 379, 384." (l. c. 212-213)

The court included in its opinion in that case a quotation from the case of *Davis* v. *Wakelee*, 156 U. S. 680, 688, as follows:

> "Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law." (l. c. 214),

and citing many cases, announced the rule:

> "A remedy at law does not exclude one in equity unless it is equally prompt and certain and in other ways efficient." (l. c. 214)

The further language of the court pertinent to this question is as follows:

> "'It must be a remedy which may be resorted to without impediment created otherwise than by the act of the party.' *Cable* v. *United States L. Ins. Co., supra* (191 U. S., p. 303, 48 L. ed. 192, 24 S. Ct. 74). Here the insurer had no remedy at law at all except at the pleasure of an adversary. There was neither equality in efficiency nor equality in certainty nor equality in promptness. 'The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party.' *Bank of Kentucky* v. *Stone*, (C. C.) 88 F. 383, 391; cf. *Lincoln Nat. L. Ins. Co.* v. *Hammer*, (C. C. A. 8th) 41 F. (2d) 12, 16. To make a contract incontestable after the lapse of a brief time is to confer upon its holder extraordinary privileges. We must be on our guard against turning them into weapons of oppression." (l. c. 215)

The court accordingly reversed the opinion of the Circuit Court of Appeals for the Tenth Circuit, which by its opinion had held that the insurance company was not entitled to have the equity case heard and had held that the insurance company must make its defense to the action at law which was pending in the same federal court. This case of *American Life Insurance Co.* v. *Stewart, supra*, is the last opinion of the Supreme Court of the United States on this subject, and we think announces the rule with respect to the right to bring, maintain and prosecute an action for cancellation, even where a suit at law is pending in the *same* court.

After the above decision the Tenth Circuit Court of Appeals rendered its opinion affirming the decision of the District Court for the District of Kansas, which had heard the equity cases, and had entered a decree of cancellation.

—*Stewart* v. *American Life Ins. Co.*, 89 F. (2d) 743.

In the case of *Ruhlin* v. *New York Life Insurance Co.*, *supra*, the Court of Appeals of the Third Circuit reviewing the case of *American Life Insurance Co.* v. *Stewart*, *supra*, and other insurance cases in the United States Supreme Court and in the Circuit Courts of Appeals, said that the case of *American Life Insurance Co.* v. *Stewart* "disposes of practically every argument made in the case at bar, relating to the adequacy of the remedy at law, adversely to the contention of the appellants."

That court there held that the insurance company was entitled to maintain its equitable action for cancellation of the policy, notwithstanding the fact that the insured had previously commenced action at law in a state court to collect the benefits of the policy the cancellation of which was sought in the equity suit.

While a writ of *certiorari* was applied for and granted (302 U. S. 681) in the case of *Ruhlin* v. *New York Life Insurance Company*, *supra*, this particular principle of law was not discussed, but the cause was reversed in order that the decision might be brought within the doctrine of the case of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

—*Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202.

Point III.

This Question Should Be Answered in the Affirmative.

The principle of law that the adequate remedy which will preclude a suit in equity must be one *available* in the federal courts, many times has been held applicable in cases involving insurance policies. This question assumes the existence of the principle, and the question is whether it is applicable in the instant case.

The question refers to the relief sought as being "affirmative in form but defensive in character." All suits brought for cancellation of insurance policies, contracts,

agreements or writings are affirmative in form in the equity suit and may be defensive in form when used as a defense to a law action. It does not occur to us that the instant case differs in that respect from any suit seeking the cancellation and delivering up of a contract in writing. It is with respect to the suit which seeks affirmative relief that the question relates.

The cases which we have cited and numerous other cases in this court and in the Circuit Courts of Appeals of the United States, announcing the principle stated in the question, have not turned upon the question of the relief sought being "affirmative in form but defensive in character," but have turned upon the question of whether the relief which a complainant seeks by a bill in equity will be denied, because it may be obtained in an action at law. If a complainant may obtain by an action at law *the same relief* to which he is entitled according to the allegations of his bill in equity, he is relegated to the action at law and cannot maintain his suit in equity.

In passing upon the point of law involved in this question, and also in the first and second questions, the facts in the case, as set out in the certificate, must not be lost sight of. The bill in equity was filed only five days before the expiration of the two-year period within which the Insurance Company had to initiate its contest. In the case of *American Insurance Co.* v. *Stewart, supra,* the suits in equity were filed "one year, five months and twenty days" prior to the expiration of the period within which they were contestable, and this fact was emphasized by the Circuit Court of Appeals of the Tenth Circuit in the two opinions preceding the decision in this Court. See:

Stewart v. *American Life Insurance Co.*, 80 Fed. 600, 601;

Stewart v. *American Life Insurance Co.*, 85 F. (2d) 791, 792.

We call attention to the statutes of Oklahoma set forth in the appendix, particularly to section 168, which provides that the summons shall be returnable within ten days from its date, and section 217, which provides that the answer or demurrer shall be filed within twenty days after the date on which the summons is returnable. Under these statutes at least twenty-one days was the earliest time in which an answer or demurrer could have been *required*. It is true that the Insurance Company might have filed its answer within the five-day period yet remaining to it, but in doing so it would have been obliged to waive its right to contest the sufficiency both of the service and the petition. Section 231 permits the filing of motions in advance of the demurrer or answer.

Under the Oklahoma statute (section 101, appendix), the Insurance Company had five years in which to bring an action.

We do not overlook the fact, as stated in the certificate, that the Insurance Company not only could set up the fraud as a defense to the action at law on the policy, but that it likewise could interpose a cross complaint in that action for a cancellation of the policies.

The question certified, and here being discussed, turns primarily, however, on the right of a plaintiff to maintain a suit in equity in the federal court where it cannot obtain the relief to which it is entitled, by a suit at law in the federal court. It is our belief that the section of the federal statutes which prohibits the maintenance of a suit in equity where an adequate remedy at law is available, was intended to apply and should apply only to the bringing and maintaining of suits, and that properly construed, it should not be held to mean that he may not maintain an action in equity if he has an opportunity *to interpose a defense* at law. This we believe to be the holding in the case of *Ameri-*

can Insurance Co. v. *Stewart, supra,* in cases of this character.

As we view this case it holds definitely and positively that the remedy at law—even in the Federal Court—has not the adequacy nor efficiency which will preclude the resort to equity.

We are not unmindful of the cases of,

Phoenix Mutual Life Insurance Co. v. *Bailey,* 80 U. S. 616; and

Cable v. *United States Insurance Co.,* 191 U. S. 287.

In the first case the action at law was pending in the same federal court in which the equity suit was brought, and the court there held that the equity suit could not be maintained because the same relief might be obtained by filing an answer in the law case. The same doctrine was adhered to in the *Cable* case, *supra,* except that the action at law was not pending in the federal court, but there was a right of removal which the insurance company could have exercised but did not exercise, and the court applied the doctrine of the case of *Insurance Co.* v. *Bailey, supra.*

The cases of *Phoenix Life Insurance Co.* v. *Bailey, supra,* and *Cable* v. *United States Life Insurance Co., supra,* were decided prior to the time when it was the practice of the insurance companies to place in their policies of insurance limitations on the period of contestability. This fact is emphasized and commented upon in the case of *Harnischfager Sales Corporation* v. *National Life Insurance Co.,* (C. C. A. 7th Cir.) 72 F. (2d) 921. There the court sustained the right of the insurance company to maintain its action in the federal court for cancellation of the policy, although an action at law was pending in the state court to which the insurance company could have filed an answer within the period of contestability. In that case the suit in equity was

filed in the federal court prior to the filing of a suit on the policies in the state court, but the period of contestability did not expire until approximately a year and a half after the filing of both actions. In this connection we desire to say that we do not understand that the time of filing the law action, whether before or after the filing of an equity suit in the federal court, can affect either the equitable jurisdiction of the federal court or the duty of the court to proceed, hear and pass upon the equitable action.

Referring to the case of *Harnischfager Sales Corporation* v. *National Life Insurance Co., supra*, we believe that the reasoning applied in that case is sound, and should be persuasive with respect to the questions here being discussed. There the court stated:

> "It is, of course, elemental that courts of equity have never taken jurisdiction over suits where an adequate remedy could be had at law. Section 723 of the Revised Statutes (28 U. S. C. A., Sec. 384) which provides that suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law, has been said to be merely declaratory of the existing law rather than establishing a new rule. *Boyce's Executors* v. *Grundy*, 3 Pet. 210, 7 L. ed. 655. It was early settled that equity was not to use its power to order the cancellation of an insurance policy secured by fraud when the facts indicating that fraud could be used as a defense to a suit on the policy. *Phoenix Mutual Life Insurance Company* v. *Bailey*, 13 Wall. 616, 623, 20 L. ed. 601. The court there stated, 'Courts of equity, unquestionably, have jurisdiction of fraud, misrepresentation, and fraudulent suppression of material facts in matters of contract, but where the cause of action is "a purely legal demand", and nothing appears to show that the defense at law may not be as perfect and complete as in equity, a suit in equity will not be sustained in a federal court, as it is clear that the case, under such

circumstances, is controlled by the sixteenth section of the Judiciary Act (28 U. S. C. A., Sec. 384).' This case was followed by the court in *Cable* v. *United States Life Insurance Company*, 191 U. S. 288, 24 S. Ct. 74, 48 L. ed. 188.

"Both of these cases were decided before it became the custom to incorporate in policies of life insurance a clause limiting the period during which such policies could be contested except for non-payment of premiums. Since the advent of these incontestability clauses the rule seems to have been established that the mere fact that such limitation is included in a policy, rendering it impossible for the insurer to set up the facts concerning the fraud in any way after the contestable period has expired, constitutes the element of possible irreparable injury necessary to confer jurisdiction upon courts of equity to hear suits to cancel policies for fraud, and to enjoin actions brought in courts of law subsequent to the filing of the bill in equity for the purpose of recovering benefits under the policies. This results from the definition of the word 'contest' adopted by a majority of the courts both federal and state, as a litigation, and requiring judicial action either by means of a suit in equity to cancel, or defense to a suit at law on the policy."

We believe, therefore, that the rule first announced in *Phoenix Mutual Life Insurance Co.* v. *Bailey*, *supra*, and followed in *Cable* v. *United States Insurance Co.*, *supra*, is inapplicable to situations where policies contain clauses such as were contained in these which specifically limit the time within which the insurance company may initiate a contest. We believe as well, that the case of *American Insurance Co.* v. *Stewart*, *supra*, in this court, supports our position. While the opinion does not directly or by express language note the distinction as does the case of *Harnischfager Sales Corporation* v. *National Life Insurance Co.*, *supra*, yet it emphasizes the "extraordinary privileges" which are given to the policy holder by these provisions.

Conclusion.

The three questions certified might well have been briefed under one point, since the authorities cited under the one are applicable to the others.

The case brought by the Insurance Company in the United States Court for the Northern District of Oklahoma was within the general jurisdiction of that court by reason of diversity of citizenship and the amount involved, and was clearly within its equity jurisdiction as well. Under the provision in the policies, at the time the suit was brought, because of the provision in the policies, it had but five days in which it must initiate a contest. The insured died just eighteen days before the period of contestability expired. This right of the Insurance Company to invoke the equitable jurisdiction of the United States Court means nothing to it if the adversary, at his own will, may determine by his action whether the United States Court will proceed to hear the complaint of the plaintiff. If the Federal Court cannot proceed to judgment and afford to the complainant its measure of redress, its right to proceed in the Federal Court means nothing.

In the very recent case of *Southern Pacific Co.* v. *Corbett*, (9th Cir.) 20 Fed. Supp. 940 (a "three-judge" opinion), the court say:

> "When a bill in equity is brought in the Federal Court, the test of the adequacy or lack of adequacy of the remedy at law is the legal remedy afforded in the Federal Court. Where no legal remedy exists in that forum, the remedy at law is inadequate. This conclusion is impelled by a consideration of the nature of the right to sue in the Federal Courts. * * * When one has a cause of action at law, and there exist requisites of Federal jurisdiction, his remedy at law is the right to sue in the state or Federal tribunal at his elec-

tion. To deprive him of this choice materially impairs the completeness and adequacy of his remedy."

See, also:

Arrowsmith v. *Gleason*, *supra*;
Payne v. *Hook*, 74 U. S. (7 Wall.) 425.

Having the undoubted right under the statute to invoke the jurisdiction of the Federal Court in the only manner by which the Insurance Company could invoke it, that court, as stated in *Kline* v. *Burke Construction Co.*, 260 U. S. 226, "was bound to take the case and proceed to judgment. It could not abdicate its authority or duty in favor of the state jurisdiction."

We respectfully submit that the questions should be answered in the manner herein indicated.

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APPENDIX.

164. A civil action may be commenced in a court of record by filing in the office of the clerk of the proper court a petition and causing a summons to be issued thereof.

165. A copy of the petition need not accompany the summons, but the defendant or plaintiff shall be entitled to a copy of the petition, or any other paper filed in the action, upon application to the clerk therefor; and the cost of such copy shall be taxed among the costs in the action.

166. The summons shall be issued by the clerk, upon a written praecipe filed by the plaintiff; shall be under the seal of the court from which the same shall issue, shall be signed by the clerk, and shall be dated the day it is issued. It shall be directed to the sheriff of the county, and command him to notify the defendant or defendants, named therein, that he or they have been sued, and must answer the petition filed by the plaintiff, giving his name, at a time stated therein, or the petition will be taken as true and judgment rendered accordingly; and where the action is on contract for the recovery of money only, there shall be endorsed on the writ the amount, to be furnished in the praecipe, for which, with interest, judgment will be taken, if the defendant fail to answer. If the defendant fail to appear, judgment shall not be rendered for a larger amount and the costs.

168. The summons shall be served and returned by the officer to whom it is delivered, except when issued to any other county than the one in which the action is commenced, within ten days from its date; and when issued to another county, shall be made returnable in not less than ten nor more than sixty days from the day thereof, at the option of the party having it issued.

217. The answer or demurrer, by the defendant, shall be filed within twenty days after the day on which the summons is returnable; the reply or demurrer shall be filed within thirty days after the day on which the summons was made returnable; the demurrer to the reply shall be filed within forty days after the day on which the summons was made returnable.

231. If redundant, or irrelevant matter be inserted in any pleading, it may be stricken out, on motion of the party prejudiced thereby; and when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment.

101. Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:

First. Within five years: An action upon any contract, agreement or promise in writing.